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May 11, 2012

Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

VIA FACSIMILE: 202-219-3923

Re: MUR 6552: Complaint against Citizens for Josh Mandel

Dear Mr. Jordan:

We are writing this letter on behalf of Josh Mandel, Citizens for Josh Mandel, Inc., and Kathryn D. Kessler, in her official capacity as Treasurer (collectively referred to as the "Respondents") in response to the Complaint filed in the above-referenced matter by Mark R. Brown ("Brown" or the "Complainant"). The Complaint was clearly motivated by Complainant's distaste for the traditional two-party system in Ohio and his desire to promote "minor party candidates," including those from the so-called "Socialist Party." Complaint at 2.

Brown has a long history of filing frivolous lawsuits on behalf of minor political parties. This Complaint is no different, as it is based solely on speculation and innuendo, and is centered around a gross misapplication and misreading of existing federal election law. The asserted facts on their face do not support a reason to believe finding in this matter, and the Complaint should be promptly dismissed.

The Commission may find "reason to believe" only if a Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Federal Election Campaign Act (the "Act"). See 11 C.F.R. § 111.4(a), (d). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true. See MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001). Moreover, the Commission will dismiss a complaint when the allegations are refuted with sufficiently compelling evidence. See *id.*

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While the Complaint contains numerous unsubstantiated and bogus claims against all named respondents, Brown's lack of command of the Act and the Commission's regulations is most evident in his irrational argument that the Mandel Respondents violated the Act by knowingly accepting a corporate contribution from the Ohio State Medical Association ("OSMA") due to OSMA's alleged posting of a video of Josh Mandel's speech at OSMA's 2012 annual meeting on its website. These accusations are unsupported by the law or facts. Each spurious allegation is addressed in turn below. It should also be noted that we submit this response solely on behalf of Respondents and not OSMA, Sherrod Brown, or his campaign committee.

1. Josh Mandel was permitted to speak to OSMA's restricted class, employees, and permissible guests, at its 2012 annual meeting.

Before focusing on the crux of Complainant's flawed argument, it is important to address his inferences that Josh Mandel may have given a speech in front of individuals outside of OSMA's restricted class, its other employees or permissible guests. A significant portion of the Complaint focuses on Brown's speculation that this may have been the case. These inferences are false.

As a 501(c)(6) trade association that represents the interests of Ohio doctors and medical students, OSMA is permitted to invite federal candidates to speak to its restricted class membership, as well its other salaried employees and guests, pursuant to the Sections 114.3 and 114.4 of the Commission's regulations. Brown admits this fact in paragraphs 15 and 16 of the Complaint, yet insists on blindly asserting that "it is unclear whether the live audience was properly limited."¹

If Brown had performed even a cursory review of OSMA's publicly available Bylaws, he would have learned that OSMA hosts its annual meeting in accordance with Chapter 3 of those Bylaws, which states, in pertinent part:

Section 2. Registration. Each member in attendance at the Annual Meeting shall register, after the member's status as a member in good standing has been verified by reference to the records of this Association. No member or Delegate shall take part in any of the proceedings of the Annual Meeting until that member or Delegate has registered. (emphasis added)

OSMA Bylaws at 10-11.²

In light of the foregoing, it is clear that OSMA only permits "member[s] in good standing" to attend its annual meeting (i.e. its restricted class). We shed light on this fact not only to make clear that Josh Mandel's speech at OSMA's annual meeting was in full compliance with federal law, but also to demonstrate Complainant's pattern of selectively picking and choosing so-called facts to conform to his hollow legal theories.

¹ See Complaint at 3, n. 3.

² Available at <http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf>

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2. Complainant has presented no evidence that OSMA posted video footage of Josh Mandel's speech on unrestricted, non-password protected portions of its website.

In the midst of Complainant's rant against the "public illusion" of the two party system in Ohio and his utterly irrelevant analysis of what constitutes a candidate "debate," he hyperbolically claims that Respondents have accepted a corporate contribution because OSMA allegedly posted a video of Josh Mandel's speech at OSMA's annual meeting on its website. This argument is inherently flawed and not at all supported by actual evidence.

As if Complainant's hollow allegation about Josh Mandel's speech and audience at OSMA's annual meeting was not enough, he takes his argument a step further in accusing Respondents of knowingly accepting a corporate contribution from OSMA as a result of OSMA allegedly posting a video of Mandel's speech on its website. This accusation is based entirely on Complainant's contention that OSMA "immediately and continuously broadcast Brown's and Mandel's campaign-related speeches to the general public...by taping...and posting them in their entirety on its unrestricted web page." Complaint at ¶26. The Complaint states further that "full video coverage of the entire 43-minute joint-presentation was posted to OSMA's official web page, which is not password-protected and is open to the general public." Complaint at ¶19.

As an initial matter, the website printouts provided by Complainant to support the allegations above do not show any video or videos of Respondents. Attachment C of the Complaint, which is purported to support the claim in paragraph 19, that unrestricted video coverage of Mandel's speech was posted on its website, does not even mention Mandel or the speeches he and his opponent gave to OSMA's members. Moreover, at the time of our review on April 27, the web address provided in paragraph 19 of the Complaint³ explicitly directs the visitor to "LOGIN," stating "To access your information, view your account history and access members-only content, please login below."⁴ This is hardly the "unrestricted" or "not password-protected" website that Complainant alleges in the Complaint.⁵ To the contrary, the web address provided in paragraph 19 contains content that is for "members-only." (emphasis added). Despite this fact, Complainant insists that the "Brown-Mandel video is fully accessible from the OSMA web page."⁶

The foregoing is troubling not only because Complainant bases the entirety of his allegations on apparently false information, but also because he attested to such falsehoods by swearing to the Complaint's contents and signing it in the presence of a notary public as required by 11 C.F.R. § 111.4(b)(2).

³ <http://www.osma.org/about-osma/annual-meeting/2012-annual-meeting-news>.

⁴ A printout of this "LOGIN" page is attached as Exhibit A.

⁵ It should be noted that the web address presented as additional so-called evidence in paragraph 20 of the Complaint also directs visitors to a "members-only" "LOGIN" page. See A printout is attached as Exhibit B.

⁶ Complaint at 5, n. 7.

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3. Even if footage of Josh Mandel's speech was inadvertently placed on OSMA's publicly-viewable website for a limited period of time, it would not constitute a corporate contribution to Respondents.

Even assuming arguendo that video footage of Mandel's speech to OSMA's members was inadvertently posted on its website by OSMA officials for a limited period of time for the general public to see, this would certainly not result in a corporate contribution to Respondents because any posting of the video was not at all coordinated with Respondents, and Respondents were never made aware of any posting. The same is the case if OSMA or another party placed footage of Mandel's speech on a third party video hosting website without Respondents' consent or knowledge.⁷

In order for a corporation's or trade association's communications beyond its restricted class to qualify as an in-kind contribution to a federal candidate, those communications must be "coordinated" with the candidate or the candidate's agent, as that term is defined under the Commission's regulations. Only if that communication meets all three prongs of the coordination test—payment, content and conduct—will it count as a coordinated communication, and qualify as an impermissible corporate contribution. There is a major difference between a candidate who coordinates the logistics of his or her presentations before a corporation's or trade association's restricted class and a candidate who coordinates with a corporation or trade association on their express advocacy communications beyond their restricted class. Complainant seems to have trouble grasping this distinction.

In this case, even if OSMA temporarily or inadvertently posted footage of Mandel's speech on its public website, Respondents were not aware of such posting. Without such awareness, there is no way that such communication would have satisfied the three-prong test for coordination. Furthermore, without knowledge of this hypothetical posting, Respondents could not have "knowingly" accepted such a prohibited corporate contribution, which the Complainant erroneously asserts in paragraph 29 of the Complaint.

In presenting such a hollow and reckless argument, the Complaint identifies "no source of information that reasonably gives rise to a belief in the truth of the allegations presented," and should be immediately dismissed. See MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001).

⁷ Paragraph 21 of the Complaint references an additional website where footage can allegedly be found of Mandel's speech to OSMA members. However, similar to the web addresses cited in other paragraphs, after clicking on the vimeo.com address provided, visitors are once again directed to a page that states "This is a private video" and "Sorry, you do not have permission to watch this private video." See <http://vimeo.com/39216200#>. A printout of the vimeo.com web page is attached as Exhibit C.

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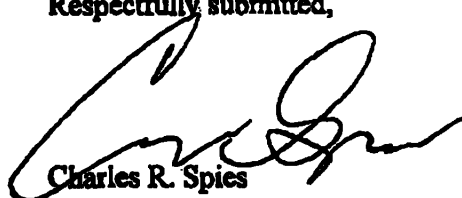
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Conclusion

Complainant Mark R. Brown in this matter has invoked an administrative process designed to protect the integrity of our elections at the behest of his own aversion to the traditional two-party system. The Complaint is undercut by a lack of credibility and substantiation, and is based entirely on false information and Complainant's shaky understanding of federal law. Respondents respectfully request that the Commission recognize the legal and factual insufficiency of the Complaint on its face and quickly dismiss it.

Respectfully submitted,



Charles R. Spies

*Counsel to Respondents Josh Mandel,
Citizens for Josh Mandel, Inc., and Kathryn D.
Kessler, in her official capacity as Treasurer*

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Exhibit

A

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2012 Annual Meeting News

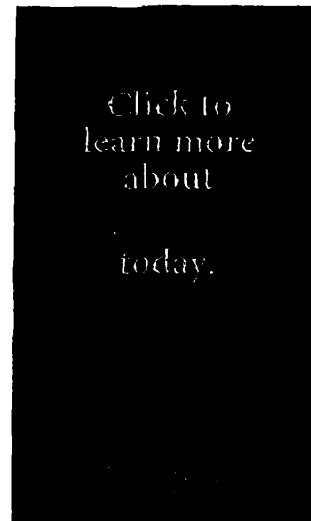
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Exhibit B

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LOGIN

To access your information, view your account history and access members-only content, please login below.

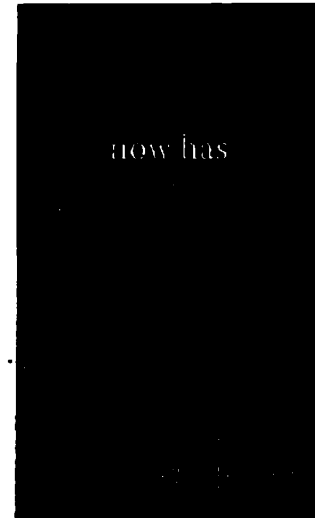
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Exhibit C

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This is a private video on Vimeo

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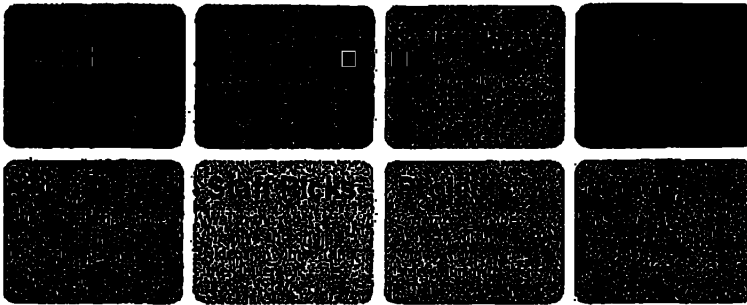
Private

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